LEMBAH MAYANG SDN BHD & ORS

v.

THE DIRECTOR OF FORESTRY & ANOR (NO 3)

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT J
[APPLICATION FOR JUDICIAL REVIEW NO: S25-02-2003]
26 OCTOBER 2005

CIVIL PROCEDURE: *Stay of order - Application for - Test to be applied - Special circumstances - What constitutes - Policy considerations*

The 2nd respondent awarded a timber concession ("said concession") to Sabah Foundation ("SF"). 10,000 hectares of the said concession were assigned by SF to Rakyat Berjaya Sdn Bhd ("RBJ") who in turn entered into agreements with the 1st and 2nd applicants giving them the right to extract, remove, purchase and then re-sell the residual merchantable timber in four coupes. The logging operations in the four coupes were supervised exclusively by the 1st respondent and his department in accordance with the provisions of the SF Enactment and the 1st respondent was also a director of RBJ. The 1st and 2nd applicants were allowed to extract timber above the 25 degree gradient but not beyond the 35 degree gradient. The 1st respondent *vide* a letter dated 28 November 2002 directed that the extraction of timber in the four coupes would be limited to areas which fell within the 25 degree slopes and not beyond, effective immediately. Following from this, the 1st respondent together with RBJ made a finding by way of letter dated 5 September 2003 that the 1st and 2nd applicants had committed serious breaches, in particular logging beyond the 25 degree slopes and ordered the suspension of logging operations and the detention of all logs. By this time the 1st and 2nd applicants had already produced logs some of which had been sold to the 3rd applicant whilst others were awaiting export to overseas buyers and royalties had already been paid to the 2nd respondent on some of those logs. On 6 October 2003, the 1st respondent imposed a penalty of almost RM3 million on the alleged breaches. RBJ as the 1st and 2nd applicants' principal agreed to this and the 1st respondent gave all the produced logs to RBJ in default of payment of the penalty imposed. The decisions and findings in the 1st respondent's letters dated 28 November 2002, 5 September 2003 and 6 October 2003 were all quashed and set aside by an order of court dated the 22 June 2004 ("said order") and the respondents applied for a stay of the said order. The sole issue that arose for determination was whether special circumstances existed to justify a granting of stay by this court to the respondents on the said order.

Held: (Dismissing the respondents' application for stay with costs)

[1] The jumble of ordinary reasons, inexplicable assumptions and clever exaggerations mixed with merits of the appeal put forward by the respondents could not conceivably constitute special circumstances. From the facts and applying the relevant principles stated in the *Kosma* case, I have no difficulty in finding that the respondents' case for stay did not measure up to the requirements that special circumstances must be established. It is incomprehensible how the effect of the said order could have the catastrophic consequences to the respondents and the environment there as envisaged by the respondents although damage, there will be, in that very tiny portion, since logging by its very nature is invariably destructive. To suggest, as the respondents did, that the rest of the area within the SF concession would likewise face the prospect of catastrophe seemed to be a preposterous exaggeration. (pp. 332 g-h & 333 a-b)

[2] The respondents' resorting to public policy consideration in relation to their implementation of the so-called sustainable forest management policy when RBJ's previous contractors had done the same in the past, without an issue, amounted to hypocrisy at its worst. The arguments relating to miscarriage of justice and the criminality of logging by the 1st and 2nd applicants, in light of the 1st respondents' prohibition, were clearly concerned with the merits of the respondents' appeal which hinges on the legality of that prohibition. (p. 333 c-e)

[3] The arguments relating to the respondent's appeal being rendered nugatory if stay was not granted was not even remotely demonstrated and on the authority of *Kosma*, nugatoriness is merely a species of special circumstances. (p. 333 e)

Case(s) referred to:

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

For the applicants - Datin Marina Tiu; M/s Yap Chin & Tiu
For the respondents - Julita Gumpil; State AG's Chambers

Reported by Sharmini Pillai

JUDGMENT

Linton Albert J:

The applicants had on 22 June 2004 successfully obtained an order of *certiorari* to quash certain obnoxious decisions and findings made by the 1st respondent against the applicants concerning their logging operations and timber business. The respondents unsuccessfully applied for a stay of the order made on

22 June 2004 and I now give the reasons for refusing the stay asked for by the respondents. The facts were these. The 2nd respondent had awarded a timber concession comprising 599,828 hectares to the Sabah Foundation, a corporation established under the Sabah Foundation Enactment 1966. The present case was confined to less than 10,000 hectares of that huge concession, comprised in four coupes which Sabah Foundation assigned to one Rakyat Berjaya Sdn Bhd (RBJ) and RBJ had in turn entered into agreements with the 1st and 2nd applicants which gave them the right to extract remove purchase and then resell the residual merchantable timber in the four coupes. Out of these sinecure arrangements RBJ stood to earn a cute commission of RM52.50 for every cubic: metre of timber produced by the 1st and 2nd applicants. The logging operations in the four coupes were supervised exclusively by the 1st respondent and his department in accordance with the provisions of the Sabah Forest Enactment and, somewhat dubiously, the 1st respondent was also a director of RBJ. It was indisputably apparent that the 1st and 2nd applicants were not prohibited from extracting timber above the 25 degrees gradient but not beyond the 35 degrees gradient, not least because RBJ's previous contractors, the immediate predecessors of the 1st and 2nd applicants had been allowed to log up to the 35 degrees gradient without any controversy. Much to the chagrin of the 1st and 2nd applicants, the 1st respondent made a rather unexpected decision in his letter dated 28 November 2002 directing that extraction of timber in the four coupes would be limited to areas which fell within 25 degrees slopes and not beyond. That directive was to be strictly enforced immediately. The decision made by the 1st respondent on 28 November 2002 was followed by a finding made by the 1st respondent in cahoots with RBJ that the 1st and 2nd applicants had committed serious breaches, particularly, logging beyond the 25 degrees slope. This was conveyed in a letter dated 5 September 2003 which also ordered continued suspension of logging operations and detention of all logs. By then the 1st and 2nd applicants had produced 13,273 logs, some of which had already been sold to the 3rd applicant while others were awaiting export to overseas buyers and royalties had been paid to the 2nd respondent on some of these logs. Finally, less than a month later, the 1st respondent, on 6 October 2003, imposed a total penalty of almost RM3 million on the alleged breaches. Curiously, RBJ who as the 1st and 2nd applicants' principal would technically have to bear the brunt of these decisions and findings, had, in the blink of an eye, acceded to all of them and to crown it all, the 1st respondent gave all the produced logs to RBJ in default of payment of the penalty imposed. The decisions and findings in the 1st respondent's letters dated 28 November 2002, 5 September 2003 and 6 October 2003 which I have set out in the foregoing paragraphs were all quashed and set aside pursuant to the application by the 1st, 2nd and 3rd applicants by an order made on 22 June 2004 and the respondents had in turn

applied for a stay of that order. So much for the background to the respondent's application for stay, which I have described in some detail in order to better appreciate the circumstances in which it came to be determined.

The application for stay was supported by the affidavit of one Sam Mannan, the current director of the forestry department; it alluded to the respondents' appeal to the Court of Appeal against the order made on 22 June 2004, the merits of the appeal and inferences as to its chances of success. The affidavit in support also set out seven specific sets of circumstances which, it was contended, constituted special circumstances. I shall begin by reproducing the statement of the law set out by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 which has undoubtedly been accepted as the standard authority on applications for stay. The following passages in the judgment of Augustine Paul JCA (as he then was) delivering the judgment of the Federal Court are reproduced:

> The general rule is that an appeal shall not operate as a stay of execution unless the court so orders. Accordingly, as Brown J said in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116 while commenting on the discretion to grant a stay:
>
> > But it is a clear principle that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it. (at p. 265)
>
> For my part, I shall first refer to the authorities cited in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Anor* to demolish special circumstances as bad law. (at p. 266)
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> The grant of a stay for any ordinary reason will have just that effect and destroy the general rule that there shall be no stay. Thus, I agree with Ramly Ali JC (as he then was) who said in *Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi bin Mohd* [2001] 5 MLJ 317 that there must be 'strong justification' for a party to come within an exception to a general rule. It is for this reason that Esher MR said the *Annot Lyle* [1886] 11 PD 114 that the granting of a stay, in the absence of special circumstances, would be acting contrary to the provisions and intention of the rules of Court. (at p. 267)
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> Finally, in *Re Kong Thai Sawmill (Miri) Sdn Bhd. Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No. 2)*, Lee Hun Hoe CJ (Borneo) in writing for the Federal Court said in clear and lucid terms at p. 132:
>
> > An appeal which would be nugatory if stay was refused by reason of the poverty of the respondent would be an example of special circumstances. See *Wilson v. Church* (No. 2) [1879] 12 Ch D 454. Another example is that payment of a judgment debt would destroy the substratum of the

> appeal: *Metropolitan Real and General Property Trust Ltd v. Slaters and Bodega Ltd* [1941] 1 All ER 310. However, an allegation on an appeal that there has been misdirection at the trial would not be sufficient to bring it within the special circumstances: *Monk v. Bartram* [1891] 1 QB 346. (at p. 269)

He would have been correct if he had said that he was not relying on nugatoriness but on some other species of special circumstances.

As Abdul Hamid Mohamad JCA (as he then was) said in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* at p. 67:

> The weight of authorities appears to me to say that the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal).
>
> It is therefore unnecessary for me to consider the merits of the respective case of the applicants and respondents. The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application (see *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406. (at p 270)

The special circumstances alluded to in the affidavit in support were advanced by Learned State Legal Officer on behalf of the respondents in this way: Firstly, the order quashing the 1st respondent's decision to limit logging to 25 degrees slope would have the following effect, namely:

(a) it would cause irreparable damage;

(b) It would amount to breach of Licence and Coupe Permit conditions and against public policy;

(c) It would amount to criminal conduct.

Secondly, the order to quash the 1st respondent's unilateral findings of the alleged breaches committed by the 1st and 2nd applicants in their logging operations would amount to miscarriage of justice and thirdly, the respondents could not be adequately compensated if the order quashing the 1st respondent's decision to impose penalties on the alleged breaches was not stayed. Clearly, this jumble of ordinary reasons, inexplicable assumptions and clever exaggerations mixed with merits of the appeal could not conceivably constitute special circumstances. From the facts, I have attempted to describe and applying the relevant principles stated in the *Kosma* case I have no difficulty in finding that the respondents' case for stay did not measure up to the requirements that special circumstances must be established. It is incomprehensible how the order dated 22 June 2004 confined as it was, to

the four coupes and quashing only the 1st respondent's decision to prohibit logging by the 1st and 2nd applicants of that portion within the four coupes between the 25 degrees slopes and up to the 35 degrees slopes, constituting a very tiny area of the timber concession awarded to Sabah Foundation could have the catastrophic consequences to the respondents and the enviroment there, as envisaged by the Learned State Legal Officer, although damage, there will be, in that very tiny portion, considering the fact that logging by its very nature is invariably destructive. To suggest, as the respondents did, that the rest of area within the Sabah Foundation concession would likewise face the prospect of catastrophe seemed to be a preposterous exaggeration. It is also beyond me how the respondents could resort to public policy considerations in relation to their implementation of the so-called sustainable forest management policy when it was honoured in its breach by RBJ's previous contractors in the area which included the four coupes, who were not prohibited from logging up to the 35 degrees slopes. With respect, that in my view, is hypocrisy at its worst. The arguments relating to miscarriage of justice and the criminality of the logging by the 1st and 2nd applicants, in the light of the 1st respondent's prohibition beyond the 25 degrees slope in the purported implementation of the sustainable forest management policy having been quashed, were clearly concerned with the merits of the respondents' appeal which hinges on the legality of that prohibition. The Learned State Legal Officer also advanced arguments relating to the respondents' appeal being rendered nugatory if stay was not granted but this was not even remotely demonstrated and, in any event, on the authority of *Kosma* nugatoriness is merely a species of special circumstances. It was, therefore, unnecessary to consider this aspect of the respondents' case separately from the other aspects of special circumstances which the respondents had failed to establish. Perhaps it is not inappropriate in the circumstances of this application to conclude by making this observation: that it would be difficult to imagine a situation where the court's discretion would be exercised in favour of the unsuccessful litigant if, in doing so, it would inflict a far greater injustice to the successful litigant; here, the prospects of the applicants having to languish, probably perish, under the draconian measures directed at them while waiting for the outcome of the respondents' appeal before the Court of Appeal and beyond were decidedly real whereas the consequences would be much less severe if the stay asked for was refused. The application was accordingly dismissed with costs.